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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
Reasons for Denying the Petition	10
Conclusion	17
Appendix A	18

INDEX TO CITATIONS

CASES:

Brotherhood of Locomotive Engineers v. Louisville & Nashville R. Co., 373 U.S. 33 (1963) 5

Brotherhood of Railroad Trainmen v. Denver & R. G. W. R. Co., 31 F.R.D. 297 (1962) 7

Brotherhood of Railroad Trainmen v. Denver & R. G. W. R. Co., 367 F.2d 137, 139 ..... 2, 10

Brotherhood of Railroad Trainmen, et al. v. Denver & R. G. W. R. Co., 290 F.2d 266 (10th Cir., 1961), *cert. den.* 366 U.S. 966 5

Brotherhood of Railroad Trainmen, et al. v. Denver & R. G. W. R. Co., 338 F.2d 407, *cert. den.* 380 U.S. 972 ..... 4, 6

Denver & R. G. W. R. Co. v. Brotherhood of Railroad Trainmen, et al., 185 F. Supp. 369 (1960) 5, 16

Gunther v. San Diego & Arizona Eastern Ry. Co., 382 U.S. 257 ..... 4, 9

Rutland Railway Corporation v. Brotherhood of Locomotive Engineers, 307 F.2d 21, 29 (1962), *cert. den.* 372 U.S. 954 14

United Steelworkers v. Bouligny, 382 U.S. 145 (1965) 11, 14, 15

STATUTES: Page

Amendment to Railway Labor Act: Public Law 89-456 (80 Stat. 208) 6
Labor-Management Relations Act (29 U.S.C.A., Sec. 185) 12
Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C.A., Sec. 412) 12
Railway Labor Act (45 U.S.C.A., Sec. 151, et seq.) ...4, 7, 9
United States Code (28 U.S.C.A., Secs. 1332, 1391) 2, 3, 7, 9, 10, 11, 12, 13, 14, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 794

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *Petitioner,*

v.

BROTHERHOOD OF RAILROAD TRAINMEN and R. E. CARROLL, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court (R. 77-81), entered on March 8, 1965, and the Order of Judgment of the District Court (R. 81, 82), entered on March 16, 1965, are not reported. The opinion of the Court of Appeals for the

Tenth Circuit, entered on September 21, 1966, is reported at 367 F.2d 137 and is reproduced in Appendix A to the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

In the opinion of respondents the petition raises the following questions:

1. Did the Court of Appeals properly determine that the amended complaint did not meet the venue requirements of Section 1391(b) of Title 28 of the United States Code in a damage suit brought by a carrier in the judicial district of Colorado (a) against individual employees of the carrier who are residents of both the judicial district of Colorado and the judicial district of Utah and the unincorporated labor organization, of which such individuals were members, whose headquarters and principal place of business is in Cleveland, Ohio, and (b) the case was handled on behalf of the plaintiff carrier by attorneys from Chicago, Illinois, while the principal witness in support of the plaintiff's case was from Dearborn, Michigan, far removed from the judicial district in which the case was brought?

2. Did the Court of Appeals err in holding that there was no basis for liability against an individual for alleged damages growing out of a strike based upon the Court's findings that the individual was chairman of a grievance committee of local union lodges on the property of the plaintiff carrier and that his only role in connection with the strike was to send to the carrier notice of the strike decision by the national union and to thereafter advise the local unions of the issuance of a Federal court restraining order?

STATUTE INVOLVED

This petition involves provisions of Title 28, Section 1391 of the United States Code (28 U.S.C.A., Section 1391). These provisions are quoted in Appendix A hereto.

STATEMENT

The petition represents the latest step in lengthy litigation growing out of violations by the petitioner Denver and Rio Grande Western Railroad Company ("Rio Grande") in 1952 of provisions of collective bargaining agreements between that carrier and the Brotherhood of Railroad Trainmen ("Brotherhood") and the efforts thereafter of the Brotherhood to correct such violations and to obtain compensation for the carrier employees affected.

The first violation involved unilateral action by the carrier in abolishing freight assignments in the State of Utah and substituting therefor new and different assignments without consultation, negotiation, or agreement with the Brotherhood, as the collective bargaining agreement required. On February 3, 1952, the Brotherhood submitted the dispute growing out of the carrier's action to the First Division of the National Railroad Adjustment Board. On December 17, 1959, the Board issued its Award No. 19372, in which the Board found that the carrier had violated the collective bargaining agreement and sustained the claims of individual employees involved for compensation for such violation.[1] The Rio Grande refused to comply with the money award of the Board. Moreover, the Rio Grande did nothing to correct the contract viola-

[1] Volume 142 of the Printed Reports of the First Division of the National Railroad Adjustment Board, page 665.

tion found by the Adjustment Board.[2] This refusal of the carrier to accept the decision of the Adjustment Board with respect to the interpretation and application of the collective bargaining agreement was not legally justified and was itself a violation of the provisions of Section 3, First of the Railway Labor Act. *Gunther* v. *San Diego & Arizona Eastern Ry. Co.*, 382 U.S. 257.

The second contract violation by the Rio Grande also originally took place in 1952 and continued over a period of approximately eight years. The contract violation involved action of the carrier in requiring the crews of incoming freight trains at its North Denver Yard to perform work outside of the scope of the applicable collective bargaining agreements without compensation therefor. The Brotherhood also submitted this dispute to the First Division of the National Railroad Adjustment Board on or about February 2, 1953. On January 20, 1960, the Board issued its Award No. 19389, in which it found that the Rio Grande had violated the contract and directed it to pay compensation to the employees who had been illegally required to perform the work involved.[3] The carrier refused to pay the employee claims which the Board thus sustained (R. 81).

Thereafter, the Brotherhood conducted a strike against the Rio Grande on May 16, 1960, because of

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[2] The facts concerning the carrier's violation of the agreement and the Adjustment Board award are set forth in *Brotherhood of Railroad Trainmen, et al.* v. *Denver & R. G. W. R. Co.*, 338 F. 2d 407, *cert. den.* 380 U.S. 972.

[3] Award No. 19389 is reported in Vol. 142 of the Printed Reports of the First Division of the National Railroad Adjustment Board, page 858.

its refusal to put such awards into effect (R. 68, 69, 73, 75). At that time, no Federal court had held that a strike under these circumstances was illegal. The Rio Grande immediately sought and obtained an ex parte restraining order. The Brotherhood promptly moved to call off the strike which lasted approximately eight hours (R. 78, 79, 94). Thereafter, the Brotherhood did not renew the strike or threaten to do so (R. 94). The strike was decided upon by the Brotherhood and respondent Carroll's only connection therewith was to send to the carrier notice of the Brotherhood decision and to immediately advise local units of the Brotherhood of the issuance of the restraining order (R. 77-80, 92-94, 157).

The District Court ultimately held that the Brotherhood did not have a right to strike under the circumstances and permanently enjoined such a strike. *Denver & R. G. W. R. Co.* v. *Brotherhood of Railroad Trainmen, et al.*, 185 F. Supp. 369 (1960). This decision was affirmed by the Court of Appeals for the Tenth Circuit, *Brotherhood of Railroad Trainmen, et al.*, v. *Denver & R. G. W. R. Co.*, 290 F.2d 266 (1961), *cert. den.* 366 U.S. 966. It was not until three years later that this Court for the first time ruled on the right of a railway labor organization to conduct a strike under such circumstances. *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville R. Co.*, 373 U.S. 33 (1963).

The Brotherhood subsequently brought actions in the United States District Court for the District of Colorado to enforce the Adjustment Board awards. The petition to enforce Award No. 19372 was filed on December 15, 1961. On September 3, 1963, the District Court entered its opinion finding that the carrier had

violated the applicable collective bargaining agreement by unilaterally abolishing and changing the freight assignment involved without negotiation or consultation with the Brotherhood, but reduced the amount of the award to the nominal sum of $1.00 per day for each claim filed by applying common law contract principles. On November 1, 1963, the District Court entered its final judgment and order in accordance with such findings. The Court of Appeals for the Tenth Circuit affirmed this decision. *Brotherhood of Railroad Trainmen* v. *Denver & R. G. W. R. Co.*, 338 F.2d 407 (1964), *cert. den.* 380 U.S. 972.

The petition to enforce Award No. 19389 was filed in the United States District Court for the District of Colorado on January 15, 1962. The District Court on April 19, 1965, found that the Rio Grande had violated the applicable collective bargaining agreements by requiring the train crews to perform the work involved but again reduced the amount of the Adjustment Board award to $1.00 per day for each claim. This decision is now before the Court of Appeals for the Tenth Circuit on cross-appeals by the Brotherhood and the individual claimant employees and by the Rio Grande. The cause was argued on May 20, 1966. Subsequently, on or about August 8, 1966, the Court of Appeals requested the parties to submit supplemental briefs concerning the effect of Public Law 89-456 (80 Stat. 208) on the appeals. This law makes Adjustment Board awards final and binding and subject only to limited court review.

The damage claim of the Rio Grande, which is the subject of the present petition, was originally filed as counterclaims to the petitions of the Brotherhood and the individual employees to enforce the two Adjustment Board awards. On motion of the Brotherhood the

counterclaims were dismissed by the District Court on the ground that they were not proper counterclaims under Section 3, First (p) of the Railway Labor Act, under which the petitions to enforce the Adjustment Board awards were filed. *Brotherhood of Railroad Trainmen* v. *Denver & R. G. W. R. Co.*, 31 F.R.D. 297 (1962). Thereafter, the carrier filed a separate action in the United States District Court for the District of Colorado (Civil Action No. 7800), asking for damages from the Brotherhood for alleged injuries suffered as a result of the strike of May 16, 1960 (R. 1-3). The Brotherhood filed a motion to dismiss the action on the grounds of improper venue or in lieu thereof to quash the return of service on the grounds that the Brotherhood had not been properly served with process (R. 4). The Rio Grande then filed an amended complaint in which respondent Carroll and the local chairmen of the Brotherhood local lodges on the property of the carrier were added as parties defendant (R. 6-8). The Brotherhood, et al., responded with a motion to strike or dismiss the amended complaint on various grounds, including (1) that it did not set forth a cause of action against respondent Carroll or the local chairmen named therein, and (2) that the complaint could not properly be brought in the District Court for the District of Colorado under Title 28, Section 1391(b), of the United States Code. This motion was denied (R. 11).[4]

When the complaint came on for trial before the District Court, the Rio Grande did not allege that it had suffered any damage during the eight-hour period of the strike as a result of the cancellation or delay in the operation of any of its passenger or freight services. All passenger and freight trains scheduled to

[4] Contrary to the assertion of the petition (page 6) the District Court gave no reason for its denial of the motion (R. 11).

operate on May 16, 1960, did, in fact, operate although delayed (R. 14-16, 79). The only damage claimed by the Rio Grande at the trial was the alleged loss of revenue to the carrier from shipments it claimed were diverted by various shippers, principally the Ford Motor Company, during the period of May 19, 1960, to June 1, 1960 (R. 17, 18, 75-80, 159, 169, 170-173). During this period, there was no strike nor any threat of a strike (R. 94). The Brotherhood, et al., were under an order from the District Court, issued on May 16, 1960, prohibiting such a strike, which the Brotherhood agreed should remain in effect until the District Court acted on the request for a preliminary injunction (R. 169, 170). A preliminary injunction was issued on June 2, 1966, and a permanent injunction on July 27, 1960 (R. 69).

The District Court, on March 16, 1965, entered an order giving judgment in favor of the Rio Grande against respondents in the sum of $37,988.37 and costs (R. 81, 82). This amount was the damage claimed by the Rio Grande from the loss of revenue from shipments it alleged were diverted by the Ford Motor Company and its suppliers during the period May 19, 1960, to June 1, 1960 (R. 79, 80). In its Findings of Fact and Conclusions of law upon which the judgment was based, the District Court did not find that the diversion in question was caused by the strike of May 16, 1960, but was "approximately caused by the existing threat of a strike and the failure to secure an injunction against such a strike" (R. 80).

The District Court dismissed the action against the chairmen of the local lodges of the Brotherhood on the grounds that there was no mention during the trial of such individuals (R. 80). Although the judgment ran

against respondent Carroll, chairman of the grievance committee of local lodge of the Brotherhood on the Rio Grande (R. 10), as well as the Brotherhood, the District Court's Findings of Fact did not include any findings that Mr. Carroll was in any way responsible for the strike (R. 77-80).

The Brotherhood and Mr. Carroll appealed the judgment. The appeal was based on the grounds:

(1) That venue for the suit did not properly lie in the judicial district of Colorado under Title 28, Section 1391(b), of the United States Code;

(2) That Mr. R. E. Carroll was improperly held liable by reason of the strike conducted by the Brotherhood although the District Court's Findings of Fact did not contain any finding of any act by Mr. Carroll in violation of the Railway Labor Act;

(3) That the Rio Grande was not entitled to recover any damages from the Brotherhood and Mr. Carroll because the strike was provoked by the action of the carrier in violating the Railway Labor Act by its refusal to make effective Award No. 19372 although it had no legal right to refuse to so act under the decision of this Court in *Gunther* v. *San Diego & Arizona Eastern Ry. Co.*, 382 U.S. 257;

(4) That the strike of May 16, 1960, was not the proximate cause of the damages awarded the Rio Grande but rather such cause was the threat of a future strike which, if it existed at all, was the threat of a lawful strike which could have been conducted only if authorized by the District Court; and

(5) That the evidence did not support the judgment since the testimony as to diversion of shipments was either inadmissible hearsay evidence or evidence vio-

lating the best evidence rule; shipments were involved which were almost immediately replaced with no loss of revenue; the judgment did not include an offset of the claimed loss of revenue by all of the carrier's expenses for the transportation of the shipments involved; and the judgment did not take into account the amount of employee wages saved by the carrier during the eight-hour period of the strike on May 16, 1960.

On September 21, 1966, the Court of Appeals reversed the judgment of the District Court. It did so on the ground that venue for the action did not lie in the United States District Court for the District of Colorado under Title 28, Section 1391(b), of the United States Code. In addition, the Court of Appeals found as follows with respect to the judgment against respondent Carroll: (367 F.2d at 139)

> "So far as the record shows, Carroll's role in connection with the strike was limited to sending the Railroad notice of the Brotherhood's strike decision and thereafter advising the local unions of the issuance of the restraining order. Carroll had no more to do with causing the strike than did the chairmen of the locals, and accordingly, he too should have been dismissed from the action."

The petition asks this Court to review such decision.

REASONS FOR DENYING THE PETITION

1. The petition argues that certiorari should be granted because the Court of Appeals erred in its interpretation and application of Title 28, Section 1391 (b), of the United States Code (Pet. 6-11). Petitioner says that the Court of Appeals should have held that an unincorporated labor organization resides for venue purposes in any judicial district in which it does business, i.e. represents employees. Such an in-

terpretation does violence to the clear language and structure of Section 1391, which specifically provides that corporations shall be regarded as residents of judicial districts in which they do business but does not so provide with respect to unincorporated associations. It is argued that such addition to the statute by way of interpretation is justified by the practical requirements of litigation involving unincorporated associations.

However, this Court in its decision in *United Steelworkers* v. *Bouligny,* 382 U.S. 145 (1965), held that the practicality argument could not be used as a basis for establishing the citizenship of an unincorporated association for the purposes of Section 1332, and was an argument which should be addressed to Congress rather than the courts. The Court of Appeals in the present case cited the *Bouligny* decision and correctly held that its reasoning constituted a rejection of the principle upon which petitioner relies. Petitioner contends that this is not so because the *Bouligny* decision involved the problem of diversity of citizenship while the present case involves the problem of venue. The point, however, is that the reasoning relied upon by the petitioner is the identical reasoning presented to the Court in the *Bouligny* case and there rejected. Moreover, petitioner is asking this Court to apply one rationale in the interpretation of Section 1332 and the opposite rationale in the interpretation of Section 1391 so that carriers will have it both ways in suits against labor unions. If the carrier chooses to sue in a state court, the labor union is to be regarded as an association of individuals so that its cause may not be removed to a Federal court. On the other hand, if the carrier chooses to sue in a Federal court, the labor union is not only to be treated as an entity but is to be treated

as a corporation to which the provisions of Section 1391(c) apply.

Further, it is not necessary to apply the reasoning of the *Bouligny* case in order to reject the proposition that an unincorporated labor organization is a resident for venue purposes of each judicial district in which it does business. Not only does the language of Section 1391 conflict with such a proposition, but Congress itself has shown that it does not so interpret the Section. Thus, in enacting Section 301 of the Labor-Management Relations Act (29 U.S.C.A., Section 185), Congress provided that a labor organization might be sued for violation of a contract between the organization and an employer either (1) in the district in which such organization maintains its principal office, or (2) in any district in which it is engaged in representing or acting for employee members. If it could have been sued in any such judicial district under the general venue statute, such a specific provision would not have been necessary. Again, when Congress provided for actions against labor organizations for violations of rights secured by Title I of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C.A., Section 412), it provided that such actions could be brought either in the judicial district where the violation occurred or where the principal office of such labor organization was located. Here, again, if an organization could be sued in any judicial district in which it is doing business under the general venue statute, it would not have been necessary for Congress to include the cited venue provisions in the later statute. The conclusion is inescapable that in a case in which venue rests upon the general venue statute, an unincorporated association is not a resident of every judicial district in which it does business.

Nor is there a practical need for the result urged by the petition. Petitioner suggests that such a result is necessary in order to enjoin a union from conducting strikes. However, in the present case the restraining order and injunction which the carrier obtained ran against all of the chairmen of the local lodges of the Brotherhood and the General Chairmen of the employees on the Rio Grande located in Colorado so that it was totally unnecessary to have the Brotherhood as a party defendant.

Moreover, the validity of the decision of the Court of Appeals with respect to venue does not have to rest on the correctness of its decision with respect to the residence of an unincorporated association. Venue did not lie under Section 1391(b) regardless of the "residence" of the Brotherhood because all of the individual defendants did not reside in the judicial district of Colorado as required by that Section. At least one of the individual defendants, Mr. M. C. Brown, resided in the State of Utah, outside of the judicial district of Colorado (R. 4-6, 10, 73). The proposed Findings of Fact submitted by the Rio Grande to the District Court specifically stated that Mr. Brown resides within the State of Utah (R. 73).[5]

[5] The petition suggests (footnote 1, page 18) that, instead of dismissing the action, the Court of Appeals should have remanded it to the District Court to determine whether in the interest of justice the case should be transferred rather than dismissed. In the *Whittier* case, cited by the petitioner, the party objecting to venue had waived its rights. In the present case, respondents preserved their rights by a Rule 12(b) motion (R. 9) and also after denial of the motion by denying the allegations of paragraph 3 of the amended complaint (R. 7) that all of the defendants resided within the judicial district of Colorado (R. 12). Moreover, there is no judicial district to which the District Court could have transferred the cause of action against all defendants residents

2. The petition argues that certiorari should be granted because the decision of the Court of Appeals conflicts with the decision of the Second Circuit in *Rutland Railway Corporation* v. *Brotherhood of Locomotive Engineers,* 307 F.2d 21 (1962), *cert. den.* 372 U.S. 954. (Pet. 11-15.) It is true that in that decision the Second Circuit held that an unincorporated association could be sued in the judicial district there involved on the ground that it was a resident of that judicial district because it was doing business there, i.e. representing employees. The basis of this decision was "the practical requirements of litigation involving unincorporated associations" (307 F.2d at 29), an argument subsequently rejected by this Court in *Bouligny, supra,* page 11. Moreover, as pointed out above, the validity of the decision of the Court of Appeals in the present case does not turn on the validity of its interpretation of Section 1391 as applied to an unincorporated association since at least one of the individual defendants was a resident of the State of Utah outside of the judicial district involved.

Further, this case does not present an appropriate vehicle for a review of the questions presented by the petition. As the petition recognizes, venue is not a jurisdictional concept but is a matter of convenience. The convenience of the Rio Grande was not served in this case by the choice of the judicial district of Colorado as a forum for its suit. The principal counsel for

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of Colorado, Ohio, and Utah. The statement in the petition that the Brotherhood was not inconvenienced by being required to defend an action more than a thousand miles from its principal place of business is without foundation in fact. The suggestion in the petition would, under the facts of this case, render the venue requirements meaningless and would simply encourage carriers to ignore them.

the Rio Grande throughout the litigation have been attorneys from Chicago, Illinois, associated with the same Chicago law firm serving as attorney on the present petition (R. 3, 87).[6]

In addition, the principal witness for the Rio Grande in the trial of the complaint in the District Court upon whose testimony most of the claim of diversion rests was the Manager of Traffic Analysis of the Ford Motor Company from Dearborn, Michigan (R. 95-115). Thus, in terms of convenience the Rio Grande and the Brotherhood as well would have been better served if the complaint had been filed in the judicial district of the headquarters and principal place of business of the Brotherhood in Cleveland, Ohio. The present petition thus seeks a review of the venue question solely to justify the bringing of the suit in a forum more than a thousand miles distance from the residence of the carrier's attorneys and its principal witness.

3. The petition argues that certiorari should be granted because the Court of Appeals decision is inconsistent with the *Bouligny* decision. The argument is that the Brotherhood is treated as a resident of Cleveland, Ohio, where its headquarters are located and which is its principal place of business only by regarding it as a jural entity. The petition contends that if the reasoning of the *Bouligny* case prevents the treatment of an unincorporated association as a resident for venue purposes of any judicial district in which it does business, i.e. represents employees, the same reasoning prevents it being regarded as a resident where it has

[6] This is also shown by appearances on behalf of the Rio Grande before the District Court and the Court of Appeals in the present case as well as in the other cited cases dealing with the enforcement of the Adjustment Board awards.

its headquarters or principal place of business. It is, as pointed out above, not necessary to the validity of the decision in this case to decide where an unincorporated labor union may be sued. Also it does not follow that treating an unincorporated association as an entity to the extent of concluding that it is a resident for venue purposes of the judicial district in which it has its headquarters or principal place of business requires that it also must be treated as a resident for venue purposes of every judicial district in which it does business, i.e. represents employees. A corporation under the venue statute is a resident of judicial districts in which it does business only by reason of a specific statutory provision in Section 1391(c) and not because it is regarded as an entity.

4. The petition argues that certiorari should be granted with respect to the findings of the Court of Appeals that the action should have been dismissed with respect to respondent R. E. Carroll because the evidence did not show that he was responsible for the calling of the strike. The petition simply argues with the Court of Appeals interpretation of the facts on this matter, which does not give rise to an issue for this Court to review.

The suggestion in the petition that Mr. Carroll, who was an employee of the Rio Grande elected by the local lodges on the carrier's property to represent them (R. 10, 77), should be held responsible for the strike because he advised the local lodges of the entry by the District Court of a restraining order enjoining the strike deserves little comment. The complaint upon which the restraining order was issued named all of the chairmen of the local lodges as well as Mr. Carroll as defendants. *Denver & Rio Grande Western R. Co.*

v. *Brotherhood of Railroad Trainmen,* 185 F. Supp. 369 (1960). Moreover, Mr. Carroll is to be commended for promptly advising the local lodges of the restraining order rather than leaving the matter to a service of process so that the strike might have gone on for a longer period of time. Certainly, such action should not be used as a basis to establish his liability for the carrier's claims.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December, 1966

APPENDIX A

STATUTE INVOLVED

Section 1391 of United States Code (28 U.S.C.A., Section 1391):

"(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

"(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

"(d) An alien may be sued in any district.

"(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

"The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

"(f) A civil action on a tort claim arising out of the manufacture, assembly, repair, ownership, maintenance, use, or operation of an automobile may be brought in the judicial district wherein the act or omission complained of occurred."